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NOTES.

SPENDTHRIFT TRUSTS AND SOUND POLICY.—Though spendthrift trusts, or inalienable equitable life estates, are deemed valid in many American jurisdictions, yet in others, and in the English courts, they are held to be contrary to law,[1] a difference to which attention is again attracted by the recent case of *Wallace* v. *Foxwell* (Ill. 1911) 95 N. E. 985. The courts which maintain the latter position do so on the theory that the restraint on alienation must fail because alienability is a necessary incident of all estates,[2] and indeed the conclusion that in general the law discountenances restraints on alienation

[1]Gray, Restraints on Alienation, § 178; 26 Am. & Eng. Encyc. Law 138, n. 3, 139, n. 4.

[2]Davidson *v.* Chalmers (1864) 33 Beav. 653; Brandon *v.* Robinson (1811) 18 Ves. Jr. 429; See Gray, Restraints on Alienation.

seems warranted.[3] But it does not follow that equitable life estates must always be alienable,[4] unless the reasons on which the general rule appears to rest[5] are applicable to them, which seems not to be the case. Legal and equitable estates are essentially different, the former being rights *in rem,* while the latter are mere rights *in personam* to proceed in equity against the trustee. Thus, creating an inalienable equitable estate is really merely giving a slighter right to the *cestui que trust* as against his trustee,[6] so that the logical inconsistency involved in burdening a complete legal estate with a condition against alienation is absent, since it would be unreasonable that one whose right is merely to insist that the trustee effectuate the terms of the trust, should be capable of doing an act inconsistent therewith. Nor is the economic danger of trammeling the free exchange of property persuasive in the case of *cestui que trustent's* interests, which play little part in trade. It seems reasonably clear, moreover, that restraints on alienation have been permitted except when thought to militate against the best interests of the community.[7]

The question therefore seems to become one of public policy,[8] and it remains to inquire whether policy supplies reasons which should outweigh the testator's intention to establish a spendthrift trust.[9] To the contention that these trusts work a fraud upon creditors, it is replied that creditors of the beneficiary cannot be defrauded by the testator's disposition of his own property[10] against which they have no equity,[11] and that once in the debtor's hands the income can be reached by execution at law.[12] It is further pointed out that since wills and deeds are matters of record, creditors cannot complain of being misled[13] as to their debtor's circumstances. These arguments, however, while perhaps forceful enough as between debtor and creditor, hardly meet the broader contention that a rule of law under which the benefits of wealth can be divorced from its responsibilities, and the means, by which one quite competent to face the ordinary responsiblities of life subsists in dishonorable comfort, can be withheld from

[3]Reeves, Real Property, § 421; Co. Litt., 223-*a*; Kent, Com.,* 131, n. 1; and see Lewis *v.* Lewis (1902) 74 Conn. 630; Sparhawk *v.* Cloon (1878) 125 Mass. 263; Gray, Restraints on Alienation, §§ 114, 115; *In re* Dugdale (1888) L. R. 38 Ch. Div. 176.

[4]Nichols *v.* Eaton (1875) 91 U. S. 716; Jourolmon *v.* Massengill (1887) 86 Tenn. 81.

[5]These reasons appear to be the logical inconsistency between giving a complete estate and rendering it inalienable, and the economic danger of permitting property to be withdrawn from commerce. 1 Reeves, Real Property, § 421; Co. Litt. 223-*a*.

[6]Smith *v.* Towers (1888) 69 Md. 77.

[7]Smith *v.* Towers *supra.*

[8]See Broadway Nat. Bank *v.* Adams (1882) 133 Mass. 170; Smith *v.* Towers *supra;* Lampert *v.* Haydel (1888) 96 Mo. 439.

[9]See Broadway Nat. Bank *v.* Adams *supra.*

[10]Smith *v.* Towers *supra;* Broadway Nat. Bank *v.* Adams *supra;* Jourolmon *v.* Massengill *supra.*

[11]Leigh *v.* Harrison (1892) 69 Miss. 923; Broadway Nat. Bank *v.* Adams *supra.*

[12]Broadway Nat. Bank *v.* Adams *supra.*

[13]Steib *v.* Whitehead (1884) 111 Ill. 237; Jourolmon *v.* Massengill *supra;* Broadway Nat. Bank *v.* Adams *supra.*

creditors,[14] is essentially vicious. But where the *cestui que trust* is incapable of caring for himself the case seems otherwise. Tradesmen are ready to tempt the weak and improvident and to take advantage of extravagence and folly. If it is the policy of the law to subject every man's property to the payment of his just debts, it is equally its policy to protect those who cannot protect themselves. Thus inalienable equitable estates for the benefit of married women are upheld,[15] and the same policy is manifest in the limited contractual liability of infants. Yet the difference in the need of protection of a normal infant of eighteen and an older man who is wanting in ordinary sense and prudence, exists in law rather than in fact; and it is submitted that a difference in law unfounded in fact is not reasonable. It is not unnatural, however, that inasmuch as married women and infants have a well defined legal status, they have been accorded a protection denied to persons less easily discovered and classified. Nevertheless, as a spendthrift is incompetent in fact as regards money matters, it seems unfortunate that his want of status in law has caused spendthrift trusts to be treated like other inalienable equitable life estates wherever the question of their validity has arisen, without reference to what would seem the desirable test of validity, namely, the character of the *cestui que trust*.

The matter is now beyond judicial control in many jurisdictions. But in legislative regulations of similar matters are to be found interesting suggestions.[16] Thus in some States so much of the income of trust property as is not necessary to support in a suitable manner the beneficiary and his family, is liable for his debts.[17] But here no distinction is made between beneficiaries competent and incompetent in fact. Perhaps the most suggestive hint, though not applied to the particular question, is to be found in statutes providing for the appointment by a judge of a guardian for persons who so squander their estates as to expose themselves or their families to want.[18] If such a law, involving to all intents and purposes a judicial determination of status as a matter of fact, can be practically applied, equally practical would be a rule exempting from liability so much of a trust estate as is necessary for the proper support of the *cestui que trust* and his family, provided that he be such a person as is described in the statute above referred to.

EXTRATERRITORIAL EFFECT OF STATUTES RESTRICTING THE RIGHT OF MARRIAGE.—It must be conceded that a nation or state has the right to prescribe the formalities necessary for the creation of the status of marriage, which is a contract *sui generis*, not always governed by the rules applicable to other contracts,[1] and that it likewise may

[14]Tillinghast *v.* Bradford (1858) 5 R. I. 205; Gray, Restraints on Alienation, § 258; and see *id.*, preface to the second edition.

[15]Jackson *v.* Hobhouse (1817) 2 Mer. 483; see Stogdon *v.* Lee L. R. [1891] 1 Q. B. 661, 670; Lampert *v.* Haydel *supra*, 446.

[16]See 26 Am. & Eng. Encyc. Law 149, n. 5.

[17]Williams *v.* Thorn (1877) 70 N. Y. 270; Tolles *v.* Wood (1885) 99 N. Y. 616; and see Mills *v.* Husson (1893) 140 N. Y. 99, 105.

[18]See Maine Rev. Stat. (1903) c. 64, § 4, cl. 2.

[1]State *v.* Yoder (Minn. 1911) 130 N. W. 10; Westlake, Private Int. Law, (4th ed.) 54.